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AD HOC COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
3-13 April 1995

SUMMARY OF THE PROCEEDINGS OF THE AD HOC COMMITTEE DURING THE PERIOD 3-13 APRIL 1995

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I. INTRODUCTION

1. The Ad Hoc Committee on the Establishment of an International Criminal Court met at United Nations Headquarters from 3 to 13 April 1995, in accordance with General Assembly resolution 49/53 of 9 December 1994.

2. Under paragraph 2 of that resolution, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies. 1/

3. The session was opened by Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, who represented the Secretary-General and made an introductory statement.

4. Ms. Jacqueline Dauchy, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee; Mr. Andronico O. Adede, Deputy Director (Codification Division, Office of Legal Affairs), acted as Deputy Secretary; Ms. Mahnoush Arsanjani and Ms. Sachiko Kuwabara-Yamamoto, Senior Legal Officers, Ms. Virginia Morris and Ms. Darlene Prescott, Associate Legal Officers (Codification Division, Office of Legal Affairs), acted as assistant secretaries.

5. At its 1st meeting, on 3 April 1995, the Ad Hoc Committee elected its Bureau, as follows:

Chairman: Mr. Adriaan Bos (Netherlands)

Vice-Chairmen: Mr. Cherif Bassiouni (Egypt)
Mrs. Silvia A. Fernandez de Gurmendi (Argentina)
Mr. Marek Madej (Poland)

Rapporteur: Ms. Kuniko Saeki (Japan)

6. Also at its 1st meeting, the Ad Hoc Committee adopted the following agenda (A/AC.244/L.1):

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Organization of work.

5. Review of the major substantive and administrative issues arising out of the draft statute for an international criminal court prepared by the International Law Commission and consideration, in the light of that review, of arrangements for the convening of an international conference of plenipotentiaries.

6. Adoption of the report.

7. The Ad Hoc Committee had before it, in addition to the draft statute adopted by the International Law Commission at its forty-sixth session, 2/ the relevant chapter of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session (A/CN.4/464/Add.1), the comments received pursuant to paragraph 4 of General Assembly resolution 49/53 on the establishment of an international criminal court (A/AC.244/1 and Add.1-3) 3/ and a report submitted by the Secretary-General pursuant to paragraph 5 of that resolution, on provisional estimates of the staffing, structure and costs of the establishment and operation of an international criminal court (A/AC.244/L.2).

8. The Ad Hoc Committee proceeded in three stages. In a first stage, it conducted a review of the major substantive and administrative issues arising out of the draft statute before it on the basis of the tentative list reproduced in annex I to the present report. An account of this phase of the proceedings is to be found in section II below.

9. In a second stage (10-11 April 1995), the Committee had before it three informal papers prepared by the Bureau, namely, an informal summary of discussions on the organizational issues, an informal paper on the relationship between the court and the United Nations, and an informal document on ratione materiae jurisdiction, as well as a fourth informal paper prepared by an open-ended group of experts chaired by Mr. Gerhard Hafner (Austria) on methods of proceedings. Those informal papers were examined in the framework of the informal meetings of the Ad Hoc Committee held on 10 and 11 April 1995. The Committee felt that the fourth informal paper prepared by the open-ended group of experts was extremely useful as a basis for further discussion on due process and agreed to include it in section II of the present summary (paras. 54-120).

10. In a third stage (12 April 1995), the Ad Hoc Committee discussed its further work, in the light of the option open to it under paragraph 3 of General Assembly resolution 49/53 to resume its work for a two-week period in August 1995. An account of this phase of the proceedings is to be found in section III below.

II. REVIEW OF THE MAJOR SUBSTANTIVE AND ADMINISTRATIVE ISSUES ARISING OUT OF THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT PREPARED BY THE INTERNATIONAL LAW COMMISSION

A. Establishment and composition of the Court

11. There was broad recognition that the establishment of an effective and widely accepted international criminal court could ensure that the perpetrators of serious international crimes were brought to justice and deter future occurrences of such crimes. The remark was made that the establishment of a single, permanent court would obviate the need for setting up ad hoc tribunals for particular crimes, thereby ensuring stability and consistency in international criminal jurisdiction. A note of caution was however struck in this respect by some representatives, who drew attention to the far-reaching legal and financial implications of the project. A remark was also made that

the result of the discussion in the Committee would inform the decision of those States which were not committed to the establishment of an international criminal court on this matter.

12. It was emphasized that the proposed court should be established as a body whose jurisdiction would complement that of national courts and existing procedures for international judicial cooperation in criminal matters and that its jurisdiction should be limited to the most serious crimes of concern to the international community as a whole.

13. It was also emphasized that without universal participation the court would not serve the interests of the international community.

1. Method of establishment

14. The view was widely shared that the proposed court should be established as an independent judicial organ by means of a multilateral treaty, as recommended by the Commission. Such an approach based on the express consent of States was considered consistent with the principle of State sovereignty and with the goal of ensuring the legal authority of the court. That approach was also recognized by many delegations as the most practical in the light of the difficulties that would be involved in establishing the court as an organ of the United Nations through an amendment to the Charter of the United Nations. It was suggested that a relatively high number of ratifications and accessions, for instance 60, should be required for the entry into force of the treaty, as a way of ensuring general acceptance of the regime. Concern was however expressed about the delays which such an approach might entail, and it was suggested that no more than 20 or 25 ratifications should be required. Emphasis was placed on the need to promote the general acceptability of the statute of the court by giving due reflection therein to the various legal systems.

15. Some delegations, on the other hand, advocated the establishment of the proposed court as a principal organ of the United Nations, in order to ensure its universality, moral authority and financial viability. The view was expressed that the difficulties involved in the required amendment to the Charter should not be overemphasized, bearing in mind the ongoing discussions concerning the restructuring of the Security Council, and that resort could be had to the amendment procedure provided for in Article 109 of the Charter.

2. Relationship with the United Nations

16. A close relationship between the proposed court and the United Nations was viewed as an essential condition of the universality and moral authority of the new institution, as well as of its financial and administrative viability. The conclusion of a special agreement between the court and the United Nations as envisaged in article 2 of the draft statute was considered by a number of delegations to be an appropriate way of establishing the required links of functional cooperation between the two institutions, while at the same time preserving the court's independence as a judicial organ. Some delegations however warned that complex issues were involved, and it was suggested that the

content of the agreement and the method of its adoption should be provided for in the statute itself, or that the agreement should be elaborated simultaneously with the statute.

3. Nature of the proposed court as a permanent institution

17. The approach reflected in article 4, paragraph 1, of the draft statute, whereby the court would be established as a permanent institution which would act when required to consider a case submitted to it, was described as an acceptable compromise which sought to strike a balance between, on the one hand, the requirements of flexibility and cost-effectiveness in the operation of the court and, on the other hand, the need to promote, as an alternative to ad hoc tribunals, a permanent judicial organ, able to ensure uniformity and consistency in the application and further development of international criminal law. Other delegations agreed with this proposal as long as it would not undermine the permanence, the stability and the independence of the court.

18. It was suggested that the permanency and independence of the court would be enhanced if some officials, such as the judges, the Presidency, the Registrar and/or the Prosecutor, were appointed on a full-time basis.

4. Appointment of the judges and of the Prosecutor

19. As regards the appointment of judges, paragraphs 1 and 2 of article 6 pertaining to the qualifications and election of judges gave rise to objections. Concern was voiced by some delegations that too rigid a distinction between judges with criminal trial experience and those with competence in international law might result in an unjustifiable quota system and complicate the selection of candidates. The singling out of those two areas of the law was furthermore considered by some delegations as unduly restricting the sources of expertise on which the court should be able to rely. A more flexible formulation, drawing inspiration from article 13, paragraph 1, of the statute of the Tribunal for the former Yugoslavia, was found preferable by some delegations. Other delegations emphasized the importance of expertise in criminal law, consistent with the character of the court, some of them suggesting that every judge should have criminal law qualifications and experience. The remark was also made that the procedures for the nomination and election of judges applicable in the context of the International Court of Justice and the Tribunal for the former Yugoslavia afforded better guarantees of independence and universality.

20. It was accordingly suggested by some delegations that the pool from which candidates would be selected should go beyond the circle of States parties and that there should be an initial screening, for example through nomination by national groups. It was also suggested that the elections should be conducted by the General Assembly and the Security Council rather than by the States parties, in order to enhance the acceptability of the institution, that a filtering role might be envisaged for the Security Council and that a two-thirds majority should be required for election. It was observed that other delegations were not in favour of extending the role of the Security Council in

this regard given that it could create limitations in the ultimate selection of judges for the court.

21. It was further suggested that paragraph 5 of article 6 should be amended to provide for equitable geographical representation, as well as the representation of the principal legal systems of the world. The view was expressed that the principal legal systems of the world should be identified for the purposes of representation. Some delegations emphasized that small States should be adequately represented in the court. Other delegations questioned the relevance of those criteria.

22. Concerning the appointment of the Prosecutor, expertise in the investigation and prosecution of criminal cases was considered to be an important requirement. It was suggested that impartiality would be better guaranteed if the Prosecutor and Deputy Prosecutors were of different nationalities and that a system of appointment by the court on the recommendation of States parties, or vice versa, would reinforce the authority and independence of the officials concerned.

23. The powers of the Presidency were considered by many delegations to be excessive and in need of further examination. The rotation system between the Trial Chambers and the Appeals Chamber was also criticized.

5. Role of the Prosecutor

24. Suggestions were made to give the Prosecutor the power to initiate investigations and prosecutions. The view was expressed that the Prosecutor should have the consent of interested States before initiating investigations and prosecutions. Another suggestion was to include in the statute rules on disqualification.

6. Adoption of the rules of the court

25. The substantive link between the statute and the rules of the court was widely recognized, as was also the special importance of the rules of evidence and of particular elements of substantive criminal law. Many delegations suggested that the rules of the court should be elaborated and adopted simultaneously with the statute, or incorporated in the statute itself. Some delegations however considered that internal rules could be elaborated and adopted by the judges themselves.

7. Other issues

26. Several delegations noted that the draft statute allowed rotation of the judges between the Trial and Appeals Chambers and expressed concern about the compatibility of such arrangements with the requirements of due process.

27. Some delegations favoured the inclusion of a provision on the non-retroactivity of the statute, bearing in mind article 28 of the 1969 Vienna Convention on the Law of Treaties.

B. Issues pertaining to jurisdiction

1. Applicable law and jurisdiction

28. As regards article 33, the view was expressed that, to satisfy the requirements of precision and certainty in criminal proceedings, the law to be applied by the court should be clearly determined by the statute rather than through reliance on national conflict-of-law rules. Applicable law, it was suggested, should be understood to cover not only the offences and penalties but also principles of individual criminal responsibility, defences and the procedural and evidentiary law to be addressed in the rules of the court under article 19. While some delegations felt that the statute itself should provide the applicable law by elaborating or incorporating the relevant conventional and customary law, other delegations emphasized the importance of accelerating the work on the draft Code of Crimes against the Peace and Security of Mankind to address such matters. Some delegations advocated a link between the draft Code and the statute.

29. Subparagraph (a) of article 33 was described as self-evident. The suggestion was made to include in subparagraph (b) a reference to the treaties listed in the annex and to bring the wording in line with Article 38 of the Statute of the International Court of Justice to avoid uncertainty or confusion, although some delegations questioned the appropriateness of applying the principles and rules of international law. Subparagraph (c), it was stated, should be amended to make it clear that national law was a subsidiary means for determining general principles of law common to the major legal systems or, alternatively, should clearly indicate the relevant national law, the State whose law would apply and the circumstances in which such law would apply, particularly as national law was far from uniform. It was also suggested that a new provision should be added concerning customary law, bearing in mind Article 38 of the Statute of the International Court of Justice.

30. As to the scope of the subject-matter jurisdiction of the court, several delegations emphasized the importance of limiting it to the most serious crimes of concern to the international community as a whole, as indicated in the second paragraph of the preamble, for the following reasons: to promote broad acceptance of the court by States and thereby enhance its effectiveness; to eliminate the risk of the retroactive application of criminal law; to avoid overloading the court with cases that could be dealt with adequately by national courts; and to limit the financial burden imposed on the international community. It was suggested that the principle of limited jurisdiction should be reflected not only in the preamble but also in an operative provision, possibly in a new article 1 or in article 20, and should be further clarified through the identification of precise criteria.

Specification of crimes

31. The view was expressed that a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (nullum crimen sine lege and nulla poena sine lege) and that the constituent elements of each crime ought to be specified to avoid any ambiguity and to ensure full respect for the rights of the accused. The following methods were suggested for defining the crimes listed in article 20: referring to, or incorporating, the provisions of relevant treaties; elaborating definitions by using the Nürnberg Charter and the statutes of the International Tribunals for the former Yugoslavia and for Rwanda as a starting point; or finalizing the draft Code of Crimes against the Peace and Security of Mankind as a matter of priority to avoid delays in the establishment of the court. Some delegations expressed reservations about using the draft statutes for the ad hoc Tribunals as a basis for defining the crimes.

32. As regards subparagraphs (a) to (d) of article 20, it was suggested that the crime of genocide referred to in subparagraph (a) should be defined on the basis of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, although greater precision and clarity might be required. It was also suggested that consideration should be given to adding social groups and political groups in the definition contained in the Convention. A contrary view was, however, expressed that this suggestion could entail revising the Convention, a task which was beyond the purpose of the Ad Hoc Committee. Some delegations expressed serious concerns about the court's jurisdiction over the crime of aggression referred to in subparagraph (b), while a number of delegations were of the view that the jurisdiction over that crime would be indispensable for the court. While some delegations felt strongly that the crime of aggression was in fact committed by individuals and should be defined on the basis of the Nürnberg Charter, as applied by the Nürnberg Tribunal almost 50 years ago, and taking into account the Definition of Aggression adopted by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974, other delegations had concerns in this respect. It was noted that no generally agreed definition of acts or wars of aggression sufficiently precise for purposes of individual criminal responsibility was available, that the personal jurisdiction of the court with respect to individuals was limited and that acts of aggression were attributable to States. It was also noted that the role of the Security Council should be taken into consideration in this regard. Subparagraph (c) was viewed as calling for further clarification: it was suggested that an exhaustive list of offences should be provided, to dispel the confusion created by the terms "serious violations" and "grave breaches" of the Geneva Conventions and to indicate whether the provision covered not only international but also internal armed conflicts taking into account the statute for the Rwanda Tribunal and the current reality of armed conflicts. Some delegations expressed serious reservations with respect to this possibility. As for subparagraph (d) (crimes against humanity), the remark was made that defining the crimes concerned would require particular attention with a view to reconciling differences in the definitions contained in the Nürnberg Charter and the statutes of the Tribunals for the former Yugoslavia and for Rwanda, clarifying the notion of "other inhumane acts" and providing an appropriate qualitative criterion. Some delegations also expressed doubts about the applicability of this provision in

time of peace. It was necessary to indicate whether the provision covered not only situations of armed conflict but also situations of peace.

33. With regard to subparagraph (e) of article 20 and the annex referred to therein, the view was expressed that the wording should make it clear that the statute would not impose obligations on States with respect to treaties to which they were not parties and should provide the necessary guidance to the court in determining its jurisdiction with respect to the phrase "exceptionally serious crimes of international concern". It was also suggested that the treaties listed in items 1 to 9 of the annex should be reviewed to determine whether the crimes covered by each treaty: (a) were defined with the degree of precision required for prosecution or required implementing national legislation; (b) could be viewed as widely accepted by the international community on the basis of the state of ratifications; (c) met the criteria contained in the second paragraph of the preamble and subparagraph (e) of article 20; (d) could not be dealt with adequately by national jurisdictions under the principle of complementarity referred to in the third paragraph of the preamble; and (e) could be effectively dealt with by the court notwithstanding the practical constraints and limitations under which it would operate. Some delegations questioned the inclusion of subparagraph (e) in the statute.

34. As regards item 1 of the annex, the view was expressed that grave breaches of the 1949 Geneva Conventions and Additional Protocol I were clearly within the ambit of the second paragraph of the preamble and subparagraph (e) of article 20. It was suggested that consideration should be given to adding violations of common article 3 and Additional Protocol II notwithstanding the inapplicability of the notion of grave breaches to the relevant treaty provisions. The suggestion was, however, opposed as being politically and legally unacceptable. The remark was also made that military personnel could not be covered by a treaty to which their Government was not a party.

35. With respect to items 2, 3, 6 and 8 of the annex, some delegations observed that terrorist crimes were not defined in the relevant conventions with the degree of precision required for prosecution, that they often involved a complex series of crimes committed by terrorist organizations over an extended period of time which could be more effectively investigated by national authorities and that they could be adequately dealt with by national courts under existing arrangements for international cooperation designed to ensure the prosecution or extradition of alleged offenders, which could be undermined by the conferral of jurisdiction on the court for the crimes in question. Other delegations, however, felt that terrorist crimes should be covered under subparagraph (e) because of their serious nature, their intrinsically international character and the potential for serious international bilateral disputes arising from either the exercise of national jurisdiction by an affected State, on the one hand, or the lack of an agreed national jurisdiction to refer the matter to, on the other.

36. Regarding item 4 of the annex, there were some doubts as to whether apartheid was defined with the required degree of precision in the relevant convention and whether it should be included as a separate crime or as a crime against humanity, subject, therefore, to the relevant qualitative criteria.

37. Concerning item 5, it was pointed out that national law had to be enacted for the punishment and prosecution of crimes against internationally protected persons pursuant to the relevant convention.

38. With regard to item 7, the question was raised whether torture should be included as a separate crime or as a war crime and a crime against humanity, subject, therefore, to the relevant qualitative criteria. A suggestion was also made to exclude the Torture Convention from the jurisdiction of the court.

39. A number of delegations opposed the inclusion of item 9 of the annex, pointing out that drug-related offences were not defined in the relevant convention, were prosecutable on the basis of national legislation, differed in character and seriousness from war crimes or crimes against humanity, could be more effectively investigated, beginning with low-level offenders, by national authorities and could be adequately dealt with by national courts under existing arrangements for international cooperation, the enhancement of which was more likely to lead to the desired goal than the conferment of jurisdiction on an international court. Other delegations, however, expressed the view that drug-related crimes were within the ambit of the preamble in terms of seriousness and as crimes of international concern since they were often linked to mercenary activities or illicit arms trafficking and could constitute a serious threat to States.

40. As regards the scope of the annex, the view was expressed that consideration should be given to expanding the current list through the addition of treaties such as those relating to slavery, and to providing an appropriate mechanism for the inclusion of relevant conventions that might enter into force after the adoption of the statute, such as the future Code of Crimes against the Peace and Security of Mankind and the 1994 Convention on the Safety of United Nations and Associated Personnel, which covered crimes likely to be committed in countries experiencing a breakdown in their national institutions. With respect to the latter convention, a number of delegations expressed the view that it would be particularly appropriate for the court to extend its jurisdiction to crimes committed against United Nations and associated personnel. However, it was also suggested that the court's jurisdiction should be limited to the most serious crimes of concern to the international community as a whole and the question was raised whether the crimes in the convention were consistent with that standard. The view was also expressed that the substance of the 1994 Convention did not directly relate to the scope of the proposed court.

2. Exercise of jurisdiction

(a) Inherent jurisdiction

41. Some delegations viewed article 21, paragraph 1 (a), as striking the right balance between the court's optional jurisdiction for most crimes and its inherent jurisdiction for the particularly heinous crime of genocide, taking into account the need to ensure broad acceptance of the statute. Other delegations favoured extending the inherent jurisdiction to grave breaches of the 1949 Geneva Conventions based on the prosecutorial rights and duties of States parties and to other crimes under general international law, in

particular those which were violations of jus cogens norms or erga omnes obligations. Some delegations, however, expressed difficulty with the notion of inherent jurisdiction, pointing out that it was not legally supported by the relevant convention and was contrary to the principles of consent and complementarity on which the statute was based; would undermine national law-enforcement efforts and overburden the court without ensuring effective prosecution in the absence of State cooperation; and was unnecessary in the light of article 23, which provided an adequate guarantee of prosecution in appropriate situations.

(b) Mechanism by which States accept the jurisdiction of the court

42. With reference to article 22, some delegations felt that it was appropriate to distinguish between acceptance of the statute and acceptance of the court's jurisdiction. In this connection, it was noted that the opt-in approach would promote broader acceptance of the statute and that the various methods of acceptance, particularly the possibility of case-by-case consent, would provide the necessary flexibility. Other delegations favoured adopting an opt-out approach, under which States parties would be generally presumed to accept the court's jurisdiction over the most serious crimes under general international law, while retaining the opt-in approach for less serious crimes under article 20, subparagraph (e). Such a combination, it was stated, would give the court a jurisdiction of reasonable scope and make it more responsive to the current needs of the international community. It was also suggested that article 22 should make it clear whether ratification of the relevant treaty was a prerequisite to the acceptance of the corresponding jurisdiction of the court.

(c) Trigger mechanism

43. As regards paragraph 1 of article 25, it was suggested that States not parties to the relevant convention should be permitted to file a complaint concerning the crime of genocide under general international law. The view was expressed that it might be appropriate to consider different trigger mechanisms for different categories of crimes. The view was also expressed that the paragraph should be further considered in the light of the appropriateness of the so-called "inherent jurisdiction" concept.

44. With respect to paragraph 2, some delegations felt that any State party that had accepted the jurisdiction of the court with respect to a crime should be able to file a complaint since the crimes involved were of concern to the international community as a whole. Other delegations felt that that possibility should only be available to States parties that had a clear interest in the case, such as the territorial State, the custodial State or the State of nationality of the victim or suspect, to avoid the substantial costs involved in a lengthy investigation in response to frivolous, politically motivated or unsubstantiated complaints. It was also suggested that the consent of a group of States whose size would be proportional to the number of States having accepted the jurisdiction of the court should be obtained before the Prosecutor initiated an investigation, or as soon as the relevant States were identified, to avoid wasting efforts on the investigation of cases over which the court would not be able to exercise jurisdiction. There were further suggestions that the complainant should be a State party to the relevant convention and should

pay some portion of the costs of the proceedings. A number of delegations opposed the latter suggestion. Different views were expressed as to whether the right to file complaints should extend to individuals, particularly victims of crimes or their relatives, and whether the Prosecutor should be able to initiate investigations or issue indictments in the absence of a complaint.

45. Regarding paragraph 3, the view was expressed that the threshold for initiating an investigation was too low since a State could file a complaint without conducting any investigation or providing any proof and that the Prosecutor was not given sufficient discretion to determine whether a complaint warranted initiating an investigation by the court without exonerating the suspect for purposes of national prosecution.

(d) Conditions for the exercise of jurisdiction

46. Paragraph 1 (b) of article 21 was viewed by some delegations as well balanced and consistent with the consensual basis of the court's jurisdiction. Other delegations felt that, to avoid subjecting the operation of the court to undue restrictions, the consent requirement should be limited to the territorial State, which had a particular interest in the prosecution of the case, or to the custodial State, whose consent was necessary for the court to obtain custody of the accused. Still other delegations took the view that the consent requirements should be extended to additional States which could have a significant interest in a case, including the State of nationality of the victim, the State of nationality of the accused and the target State of the crime. It was also suggested that consideration should be given to the interests of States in specific categories of cases and to the need to obtain the consent of the custodial State at the time of arrest. The view was expressed that the provision would need to be further examined in conjunction with article 20 and paragraph 1 (a) of article 21.

47. As regards paragraph 2 of article 21, the view was expressed that a requesting State or a sending State entitled to assert jurisdiction under an extradition treaty or a status-of-forces agreement, respectively, should be able to prevent the court from exercising jurisdiction even if the custodial State denied the request to surrender a suspect. However, the view was also expressed that the legal basis for requiring such consent was questionable; that attention should be paid to situations in which an extradition request was denied without legal justification or was a pretext for requiring the requesting State's consent; and that the complexities of status-of-forces agreements called for further consideration. Care should be taken not to create irreconcilable obligations for States.

48. The view was expressed that the provisions of article 35 should be viewed as preconditions for the exercise of jurisdiction by the court in all cases, rather than in terms of a discretionary power to be exercised by the court in certain situations. It was suggested that the principle of complementarity should be reflected more clearly in the form of a precondition to ensure that the court would not interfere with the legitimate investigative activities of national authorities or exercise jurisdiction when a State was willing and able to do so, including under bilateral extradition treaties or status-of-forces agreements. Also in relation to the complementary role of the court, it was

suggested that national courts should have priority as regards violations of international humanitarian law and alleged crimes of their armed forces involved in United Nations operations. Other comments included: (a) that subparagraph (a) should be redrafted to provide that a case would be inadmissible if it had been duly investigated by a State and there was no reason to believe that the decision of that State not to prosecute was not well founded; (b) that subparagraph (c) of article 35 should be revised to be consonant with the second paragraph of the preamble; (c) that grounds deriving from the principle non bis in idem (art. 42, para. 2) and from the rule of speciality (art. 55) should also be included among grounds for inadmissibility; and (d) that a vexatious complaint constituting an abuse of legal process, or unjust prosecution, taking into account the circumstances of the accused such as age or ill-health, should also be considered inadmissible.

(e) Role of the Security Council

49. As regards paragraph 1 of article 23, some delegations felt that the role envisaged for the Security Council was consistent with its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations and that the referral of situations by the Security Council under Chapter VII would enhance the effective operation of the court while obviating the need for the creation of additional ad hoc tribunals. The view was expressed that referrals by the Security Council would ensure the independent and even-handed prosecution of the most serious crimes on a world-wide basis, even where the States concerned were not parties to the statute or had not accepted the jurisdiction of the court. However, other delegations voiced concern that the provision would confer additional powers on the Security Council not provided for in the Charter and would undermine the independence and impartiality of the court in the performance of its judicial functions. More specific comments on paragraph 1 included: (a) that reference should be made to the existing powers of the Security Council under Chapter VII of the Charter of the United Nations; (b) that Security Council referrals should be clearly limited to situations as opposed to individual cases; (c) that appropriate guarantees should be provided for to ensure prosecutorial discretion, the independence of the court in determining individual criminal responsibility and the rights of the accused in such situations; (d) that the paragraph should confirm the power of the court to determine its jurisdiction under article 24; (e) that it should be indicated whether the preconditions to the exercise of jurisdiction by the court would be applicable; (f) that appropriate financial arrangements should be provided for; and (g) that the concurrence of the General Assembly should be required. While some delegations felt that the statute should confer a similar role on the General Assembly, others delegations questioned that possibility in view of the non-binding nature of the Assembly's decisions.

50. With regard to paragraph 2 of article 23, some delegations felt that requiring a prior determination by the Security Council that an act of aggression had been committed by a State before the court could exercise its jurisdiction with respect to individual criminal responsibility for that act was consistent with the role of the Security Council under the Charter and the role of the court under the statute. It was suggested that, to ensure the necessary coordination between the Security Council and the court, the Council should play

a similar screening role with respect to war crimes and crimes against humanity when they affected the maintenance of international peace and security. However, other delegations felt that the role envisaged for the Security Council could hamper the effective operation of the court as a result of the veto; would result in inequality since the veto could be used to shield individuals from prosecution for aggression; would subordinate the independent and impartial judicial decisions of the court to the political decisions of the Council; was inconsistent with the interest of the international community in the prosecution of the crime of aggression and the effective operation of the court; and was not required by the Charter since the International Court of Justice could consider legal questions relating to Article 2, paragraph 4, without a prior determination by the Council. It was suggested that paragraph 2 should be considered further in connection with subparagraph (b) of article 20.

51. As for paragraph 3 of article 23, it was supported by some delegations on the ground that it would preclude interference with the Security Council's primary responsibility with respect to the maintenance of international peace and security. It was suggested that this should be expanded to cover matters of which the Security Council was seized. Other delegations, however, found it vague and expressed concern that it would make it possible to paralyse the court over an extended period by simply keeping a matter on the Council's agenda. The provision was viewed as requiring further consideration in connection with paragraph 2.

52. Some delegations suggested the deletion of article 23. However, other delegations were of a different view.

(f) Statute of limitations

53. Some delegations felt that the question of the statute of limitations for the crimes within the jurisdiction of the court should be addressed in the statute in the light of divergencies between national laws and bearing in mind the importance of the legal principle involved, which reflected the decreasing social importance of bringing criminals to justice and the increasing difficulties in ensuring a fair trial as time elapsed. However, other delegations questioned the applicability of the statute of limitations to the types of serious crimes under consideration and drew attention to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

C. Methods of proceedings: due process

54. The present summary endeavours to list the main issues raised with regard to Parts 4 (Investigation and prosecution), 5 (The trial) and 6 (Appeal and review) of the draft statute during the Ad Hoc Committee's debate on 6 April 1995. It reflects only the views expressed and the proposals made in that debate, and is presented without prejudice to the written comments on the draft statute as contained in document A/AC.244/1 and Add.1-3 as well as to the comments reflected in document A/CN.4/464/Add.1, or to any other views or proposals that delegations may wish to put forward.

1. General observations

55. The question of the methods of proceedings was viewed as going beyond technical concerns and touching upon fundamental aspects of the proposed institution. It was felt essential to bear in mind, first, that the court, in view of the considerable powers it would enjoy in relation to individuals, should be bound to apply the highest standards of justice, integrity and due process; second, that the demand for due process was of special cogency in relation to defendants involved in proceedings conducted away from their home country and away from where the evidence and witnesses were readily available; and third, that precedents would be scarce or unavailable. Emphasis was placed on the need to have the rules of the court prepared by States rather than by the judges and to have them eventually adopted by States parties to the statute.

56. The remark was made that in drafting the statute, the International Law Commission had drawn inspiration from common-law practice. Bearing in mind that both the civil-law and common-law systems would be represented on the court, it was felt necessary to give appropriate reflection to both systems in the statute as well as in the rules of the court.

57. There seemed to be a general agreement that the articles on due process as formulated by the ILC served as a useful point of departure for the further deliberations. However, as was evidenced by the debate, there was a need for further elaboration of these articles as well as further work on the rules of evidence and procedure, and for determining whether such rules should be elaborated in conjunction with the statute itself. Referring to the intention expressed in the third paragraph of the preamble of the statute that the court was to "be complementary to national criminal justice systems", several delegations highlighted the difficulties involved in establishing an adequate relationship between the court and national authorities for the purpose of implementing the provisions of the statute on due process.

58. It was generally recognized that Part 4 (Investigation and prosecution) should be carefully reviewed to ensure, inter alia, a proper balance between two concerns, namely effectiveness of the prosecution and respect for the rights of the suspect or the accused. Emphasis was placed on the need to formulate the provisions on due process in such a way as to allow for the application of standards contained in relevant human rights instruments. Some concern was voiced, particularly in relation to articles 28, 30 and 46, that the statute drew extensively on the common-law system, even though the civil-law system might afford greater protection to the suspect or the accused at the early stage of investigation or prosecution.

59. It was pointed out that some issues, such as that of the powers of the Presidency, were not confined to one article and needed to be examined comprehensively. The remark was also made that the role of the Security Council under Part 4, for example in relation to article 25, paragraph 4, and article 26, paragraph 5, would depend upon the nature and extent of the court's jurisdiction, to be defined in Part 3 of the draft statute. Attention was also drawn to the complex interplay between, and division of, responsibilities of the court and those of the national authorities which required a further analysis in the context of several articles, including articles 28, 29, 35, 38 and 42.

2. Specific issues

Article 25

60. The general point was made that the precise formulation of this article would have to be determined in the light of the outcome of the discussion on the jurisdiction of the court under Part 3.

61. A proposal was made that there should be a certain minimum number of States before a complaint could be lodged under the article, as opposed to individual States.

62. Paragraph 3 was viewed by several delegations as calling for further scrutiny to prevent the submission of frivolous cases or cases for purely political reasons. In this connection, it was suggested that the phrase "as far as possible" should be deleted.

Article 26

63. The remark was made that the relationship between investigations conducted under national procedures and those carried out in relation to the same conduct under the present article called for a careful review. Attention was drawn to the relevance, in this context, of issues addressed in article 35.

64. The view was expressed that the Prosecutor, in investigating alleged crimes under paragraph 2, should act in conformity with established practice in matters of international judicial assistance. The provision enabling the Prosecutor to conduct on-site investigations gave rise to special concern; it was argued that the provisions should be brought in line with the established practice of cooperation and judicial assistance, as well as with constitutional requirements of certain States.

65. Paragraphs 3 and 5 were considered by some delegations as further examples of overly broad powers of the Presidency and as requiring further examination to ensure that they were fully consistent with the principle of "complementarity". The question was asked whether safeguards for the rights of witnesses should not be provided.

66. As regards paragraph 4, it was suggested that the limits of the Prosecutor's discretion to decide not to prosecute should be clarified, taking into account, in particular, issues on inadmissibility addressed in connection with article 35. It was generally felt that similar concerns arose in relation to the provisions of article 27, paragraphs 1 and 4, relating to the filing, confirmation or amendment, of an indictment.

67. With respect to paragraph 5, the point was made by some delegations that States parties to the statute having accepted the jurisdiction of the court should have the possibility to participate in the review of the Prosecutor's decision.

68. Doubts were expressed about paragraph 6. It was asked, in particular, whether subparagraph (a) (i) was not going beyond what was strictly necessary,

whether the suspect should not be entitled to be informed of the charge against him or her, and whether paragraph (b) was appropriate. The remark was made that these issues were also relevant to article 43.

Article 27

69. A substantial number of delegations expressed concern over the broad powers of the Presidency with respect to indictments. There was a view that these powers undermined the independence of the Prosecutor.

70. Emphasis was placed on the need to clarify the Prosecutor's discretion to file and possibly amend the indictment. It was suggested that the suspect should be entitled to be heard, in order to ensure that the amendment of indictment did not infringe upon his or her rights.

71. With respect to paragraph 5, the remark was made that attention should be paid to the disclosure of sensitive information because of possible adverse consequences. It was pointed out that the same issue arose in the context of article 38, paragraph 4, and article 41, paragraph 2.

Article 28

72. There was extensive discussion on the issue of provisional arrest which brought forward the difficult problem of the division of responsibilities between the court and national judicial systems. It was noted that the problem arose in the context of article 30 as well. Concern was expressed over the permissible length of detention and the consequences of its expiry, the powers of the Presidency, the adequacy of criteria for arrest and the consequences of release from arrest. The legal basis for the provisional arrest of a suspect was also queried.

Article 29

73. With respect to the pre-trial stage, the nature of the proceedings before the national judicial officer and the extent of the rights of the suspect were viewed as calling for clarification. The question was asked whether the article should lay down specific standards for the protection of the rights of the suspect. In this connection the question was asked whether the article should not reflect or represent a more balanced division of responsibilities between the international criminal court and national authorities. Attention was also drawn to the constitutional problems which some States would face, and to the practical difficulties which many States would encounter with the article as currently drafted, in achieving such a balanced division.

74. Practical and constitutional concerns were expressed, in particular with respect to paragraph 2.

75. Concern was expressed about the need to clarify the meaning of provisional arrest and its relationship to other forms of arrest throughout the statute. Attention was drawn to the need to keep to a minimum the duration of detention following arrest, as well as to provide procedures for dealing with applications for release.

76. As regards paragraph 3, the point was made that the issue of compensation also arose in relation to provisional arrest (art. 28) and in case of exoneration (arts. 45 and 50).

77. Questions were furthermore raised as to the eligibility for, and mechanics of, compensation as well as the need to identify the authorities which would be liable for payment.

78. The article was also viewed as insufficiently detailed with respect to procedures at the pre-trial stage and it was stated that more detailed provisions were required, including those on arrest, detention and appearance before, and so also the role of, the judicial authorities.

Article 30

79. The duty imposed on the Prosecutor in paragraph 1 raised once again the difficulties involved in reconciling the respective responsibilities of the international criminal court and those of national authorities. Particular difficulty arose over the uncertainty as to which jurisdiction, the national one or that of the court, should govern provisional arrest. Furthermore, it was reiterated that the suspect should be served with the indictment prior to its confirmation.

Article 31

80. A question was raised as to the extent to which persons made available to the Prosecutor to assist in a prosecution would have the power to act; this was seen as connected with the problem of the overall powers of the Prosecutor, as already referred to in paragraph 64 above in connection with article 26.

Article 33

81. This provision was mostly discussed in connection with issues pertaining to jurisdiction and has therefore been left out of the purview of the present summary.

Article 34

82. The reference to "interested State" was viewed as calling for clarification. The timing of challenges, in particular after the commencement of the hearing, and the locus standi to make challenges in that phase of the trial gave rise to divergent opinions.

Article 35

83. This provision was considered as one which should give clear expression to the principle of "complementarity".

84. It was suggested that the various grounds of inadmissibility, including those covered by articles 42 and 55, should be grouped in a separate part of the statute.

85. With reference to the word "may" in the introductory phrase of this article, the view was widely held that there should be no discretion for the court to declare a case admissible if the grounds for inadmissibility had been duly made out.

86. The previous calls for a clarification of the term "interested State" were reiterated in the present context.

87. It was also remarked that the wording of the article needed to be reviewed in the light of article 27.

88. Whereas subparagraph 9 (a) was viewed by some delegations as redundant in the light of article 26, paragraph 1, others proposed the insertion of additional grounds of inadmissibility such as acquittal after a properly brought case. Subparagraph (b) was considered as problematic in so far as its wording gave rise to divergent interpretations. As for subparagraph (c), the question of the entitlement of the accused to invoke insufficient gravity was raised. There was also a view that the subparagraph should be deleted.

Article 36

89. Some delegations raised the question whether further parties should have the right to be heard, in particular in the exercise of the right of diplomatic protection by the State of which the accused was a national.

Article 37

90. The rule that the accused should be present during the trial was widely endorsed. Some delegations, which invoked, inter alia, constitutional reasons, argued that the rule should not be accompanied by any exceptions. For others, exceptions should only be permitted in clearly specified circumstances.

91. Paragraph 2 as a whole was viewed by some delegations as too broad or imprecise, but was considered by others as striking an adequate balance between the rule and the exceptions.

92. With reference to subparagraph (a), reservations were expressed on the appropriateness of the ground of "ill-health" and it was queried whether, at least in some cases, this ground would not already amount to incapacity to stand trial. 4/ Whether reasons of security had a place in this context was also questioned.

93. With reference to paragraph 4, the need for an Indictment Chamber was queried and it was suggested either to delete the paragraph or to establish a permanent indictment chamber which would take over the powers of the Presidency such as those under article 27.

94. It was furthermore proposed to limit the function of an Indictment Chamber in in absentia proceedings to the preservation of evidence. In this context, concern was expressed about the subsequent use of evidence and attention was drawn to the desirability of providing safeguards to protect the rights of the accused. To some delegations, this article also raised the question of the

entitlement of the accused to legal representation before the Indictment Chamber.

Article 38

95. A number of delegations reiterated in the context of this provision their view that the draft was not explicit enough on procedures and that more details should be provided possibly through the rules of the court.

96. With reference to paragraph 1 (d), the notion of "plea of guilty or not guilty" gave rise to criticisms. The view was expressed by some delegations that the effect of a guilty plea would need to be spelled out in view of the differences between civil-law and common-law systems. The remark was made that, in view of the gravity of the crimes within the jurisdiction of the court, it would be inappropriate to permit plea bargaining.

Article 39

97. Attention was drawn to the need to define more precisely the concept of treaty applicability so as not to infringe upon the principle of nullum crimen sine lege. It was generally asked, in relation to the treaty crimes referred to in article 20 (e), whether ratification or accession by a certain State was necessary for a treaty to be applicable for the purpose of the statute. The question was also raised whether, once a person had been handed over to the court, the relevant treaty remained applicable in the sense of subparagraph (b), despite the fact that the court was not a party to the relevant treaty.

98. Subparagraph (a) raised the problem of the non-retroactive applicability of penal provisions and was viewed as calling for further examination once the final shape of article 20 had been determined and for certain redrafting. A view was expressed that the qualification of a crime under international law seemed redundant in view of the reference to article 20 (a) to (d).

Article 41

99. A substantial number of delegations stressed the need to guarantee minimum rights for the accused in conformity with article 14 of the International Covenant on Civil and Political Rights.

100. Consequently, it was argued that a special regime should be provided for juveniles in accordance with that article.

101. The issue of mandatory legal assistance was viewed as particularly important in view of the seriousness of the crimes within the jurisdiction of the court. Emphasis was placed in this context on the need to establish rules on the qualifications, powers and remuneration of defence attorneys and on the procedure governing the appointment of court-assigned attorneys.

102. The views expressed in the context of article 27 on the limits to be placed on the disclosure of sensitive information were reiterated in the context of paragraph 2.

Article 42

103. The crucial importance of the non bis in idem principle in the interplay between national jurisdiction and the jurisdiction of the court was widely recognized. In this context one view was however expressed that article 42 in its current form came close to undermining the principle of "complementarity". The appropriateness of empowering the court to pass judgement on the impartiality or independence of national courts was seriously questioned.

104. Certain countries raised constitutional difficulties with regard to this provision.

105. With reference to subparagraph (a) of paragraph 2, some delegations expressed serious reservations about a criterion based on the concept of "ordinary crime". It was proposed to delete the subparagraph.

106. Subparagraph (b) was considered by some delegations as too vaguely formulated and as involving subjective assessments.

Article 43

107. This provision was viewed by a few delegations as calling for further elaboration, particulary with regard to the protection of victims and witnesses. Also noted was the need to consider the rights of the accused in this context.

Article 44

108. There was a general feeling that this article required further scrutiny in the framework of the statute and/or in the context of the rules of the court.

109. As regards paragraph 2, it was widely held that cases of perjury should be prosecuted by the international criminal court rather than by national courts.

110. Several delegations supported the principle set forth in paragraph 5. The view was however expressed that careful attention should be paid to the way in which the provision would operate in practice and it was suggested that the grounds for inadmissibility of evidence should be more narrowly circumscribed.

Article 45

111. As regards paragraph 1, several delegations felt that the presence of all members of the Trail Chamber should be required throughout the proceedings. With reference to paragraphs 2 and 5, the question was raised whether judges should be entitled to deliver separate or dissenting opinions. Divergent views were expressed in this connection. It was noted that the issues of the quorum and dissenting opinions would also arise in connection with article 49.

112. As to paragraph 3, questions were raised concerning the meaning of the expression "sufficient time" and as to what should be the consequence of the failure of the Trial Chamber to agree on a decision.

Article 47

113. In the view of many delegations, this article gave rise to a serious problem as to its conformity with the principle nulla poena sine lege. It was generally held that there was a need for maximum penalties applicable to various types of crimes to be spelled out. The view was also expressed that minimum penalties should also be made explicit in view of the seriousness of the crimes. It was also proposed to introduce criteria as to the choice of appropriate penalty.

114. With regard to paragraph 1, the exclusion of the death penalty was supported by many delegations. Some delegations suggested provision for such exclusion, while one delegation proposed that the death penalty be included in the list of possible penalties. It was suggested that suspension of penalties be addressed. A number of delegations wondered whether a fine would be commensurate with the seriousness of the crimes under the jurisdiction of the court. Some delegations further questioned the enforceability of fines and asked whether failure to pay could lead to the imposition of a term of imprisonment. Proposals were also made that the statute should provide for confiscation, restitution of property and compensation for victims.

115. Paragraph 2 gave rise to serious concern on the part of many delegations owing to the lack of certainty regarding the law to be applied. There was a proposal to apply only the law of the State where the crime had been committed; another proposal was to apply exclusively the law of the State of the nationality of the accused.

116. Several delegations suggested the need for further consideration of paragraph 3. Concern was expressed, in particular, as to the appropriateness of subparagraphs (a) and (b).

Article 48

117. A number of delegations questioned the adequacy of, or necessity for, the grounds for appeal as laid down in this article.

Article 49

118. A number of delegations thought it necessary to introduce a time-limit for the lodging of an appeal.

Article 50

119. The question was raised whether the grounds for revision listed in article 50 were broad enough to accommodate developments in relevant national law. Concern was also expressed that the article did not contain any provisions regarding compensation for the wrongly convicted person, bearing in mind the provisions of article 14, paragraph 6, of the International Covenant on Civil and Political Rights.

3. Additional remarks

120. Some delegations thought it necessary to provide for sanctions and other consequences, including compensation, in case of misconduct of the prosecutors, judges or other officers of the court.

D. Relationship between States parties, non-States parties and the international criminal court

121. It was emphasized that international cooperation as discussed under the present heading should basically be governed by the principle of complementarity.

122. The duty to cooperate was viewed as too broadly stated in article 51, paragraph 1, which seemed to require States to cooperate, even if, for example, the request was unreasonable. It was also observed that the article did not allow States parties the necessary freedom to use their own judgement in rendering international judicial assistance in a criminal case. The wording "States parties shall use their best efforts to cooperate" was proposed to meet this concern.

123. With respect to paragraph 2, it was suggested that safeguards should be provided to protect both individuals whose lives might be put at risk as a result of the disclosure of sensitive information, and the confidentiality of the information presented to the court. There was also the view that the seizure and freezing of the proceeds of crimes might be included in the list contained in the paragraph.

124. As to paragraph 3, it was suggested to provide therein for the case of referral of a matter to the court by the Security Council acting under Chapter VII of the Charter. Some delegations noted their opposition to such referrals by the Security Council. The suggestion was also made to confer on the court a consultative function to enable it to assist national courts in their interpretation of relevant treaties.

125. With respect to article 52, the view was expressed that the issue of provisional arrest needed further consideration. It was suggested that, given the considerable legal complications that might arise from the arrest of individuals and the seizure of property, the article should be expanded to cover some of the issues addressed in standard extradition treaties, such as the protection of the rights of the accused. There was also the view that a decision on the legality of a provisional measure of arrest or detention could only be made by a national jurisdiction. The point was further made that account should be taken of the fact that international practice only provided for provisional arrest and not for the seizure of documents and other evidence.

126. As to article 53, concerning the transfer of an accused to the court, several points were raised, many relating to the eventuality of competing extradition or transfer requests. The suggestion was made to provide for the possibility that an accused might successfully challenge his or her transfer to

the court. The question was asked whether the reference to an arrest warrant in paragraph 1 encompassed a warrant for provisional arrest.

127. The view was expressed that, taking into account the principle of complementarity, even those States that had accepted the jurisdiction of the court should have the right to decide whether to initiate judicial proceedings, extradite the suspect to a requesting State or transfer him or her to the court. Concern was expressed that the article in some of its provisions reflected a tendency to treat the obligation to transfer as an overriding one in relation to a treaty obligation to extradite or prosecute. The remark was made that article 53, paragraph 2 (b), and article 54 both referred to the obligation to extradite or prosecute and to the relationship between the court and the national jurisdictions and might perhaps be merged and further clarified.

128. In respect of article 55 on the rule of speciality, it was proposed that the request of the court for a waiver of the requirements in paragraphs 1 and 2 should be accompanied by the comments of the accused, in order to provide the State concerned with additional elements on which to base its decision in the matter. It was pointed out that a clause along those lines was to be found in many extradition arrangements. On the other hand, the view was also expressed that paragraph 3 should be eliminated, so as not to allow for any exception to the rule of speciality.

129. The view was expressed that article 57 relating to communications and documentation should be carefully thought through in order to ensure that all relevant information was supplied. The suggestion was made to allow transmission via fax. It was also proposed to deal specifically with requests for judicial assistance and requests for the transfer of a suspect.

130. The view was expressed that article 58 on the recognition of judgements should specify that judgements of the court were to be recognized as being on a par with judgements of national courts. However, reference was made in this context to the principle of complementarity and to the risk of shielding from any further prosecution an individual who had been acquitted by the international criminal court because of failure of cooperation on the part of national authorities.

131. With reference to article 59, concerning the enforcement of judgements, the suggestion was made to provide that States parties were obliged, when requested by the court, to enforce sentences of imprisonment, so that the ultimate burden would not be on the host State. The view was expressed that each State should have the possibility to specify the conditions or criteria under which it might accept convicted individuals. The remark was made in that connection that a State should not be called upon to accept a foreigner who was not linked to it by any familial, social or cultural ties except in the most exceptional cases.

132. Emphasis was placed on the need to require that the sentence be clearly defined taking into account the crime, any specific circumstances and national legislation to ensure equitable treatment of prisoners and to clarify the basis on which the court would discharge its supervisory function. Concern was expressed that there should be certainty and uniformity in sentencing, as well as in respect of pardon and parole.

133. It was suggested that certain standards for prison facilities should be established, but not necessarily in the statute itself, and that, if fines were retained as a penalty, procedures for the collection of fines should be provided for.

134. Regarding article 60, concerning pardon, parole and commutation of sentences, the view was expressed that the court might not be in the best position to decide on the release of the prisoner or the timing of that decision, and that when it committed a prisoner to a particular correctional system, national law should govern.

E. Budget and administration

135. As regards budgetary aspects, three main trends emerged: according to one trend, the costs of the court should be financed from the regular budget of the United Nations; according to another trend, they should be borne by States parties to the statute; and under a third trend, it was premature to discuss budgetary matters in detail until the nature of the court and the degree of its general acceptability had been clarified.

136. The proponents of the first approach emphasized the need to ensure the universal character of the court by making it part of the United Nations system. They felt it was necessary, given the nature of the crimes over which the court would exercise jurisdiction, to make it possible for all States to initiate proceedings without financial burdens - an objective which could not be achieved if only the States parties to the statute were to contribute to the financing of the institution. It was also observed that on a practical level it had been difficult to finance other institutions in this area by any voluntary or opting-in method alone.

137. Those favouring the second approach pointed out that a wide interest in the court on the part of States would translate itself into wide participation in its statute and, therefore, in a large number of contributing parties. Mention was made of the possibility of resorting to a formula similar to that applicable in the framework of the Permanent Court of Arbitration.

138. It was suggested that consideration should be given to making a State which initiated a procedure before the court share in the costs involved, with due regard to the special position of developing countries. A view was also expressed that costs of judicial assistance at the request of the court could be considered costs of the court itself. In response to the argument that a State might be precluded from seeking justice for lack of means, the opinion was expressed that very few States were so lacking in resources that they could not make some contribution, bearing in mind, in particular, that in the absence of an international criminal court, they themselves would have to bear the relevant costs. The remark was also made that the United Nations should bear financial responsibility in relation to cases referred by the Security Council.

139. In order to reduce costs, however funded, it was suggested that, whenever possible, the court should move to the location where a particular crime had been committed. It was also suggested that a State which lodged a frivolous

complaint should be made to pay some of the costs. Mention was further made of the possibility of establishing an auditing mechanism to monitor the expenditures of the court, as well as a supervisory mechanism to oversee the administration of the court.

140. It was pointed out that the court would need to have a legal personalty. It was also suggested that the statute should include provisions regarding the privileges and immunities of the court and its officials.

III. FURTHER WORK OF THE AD HOC COMMITTEE

141. The Ad Hoc Committee agreed to avail itself of the possibility open to it under paragraph 3 of General Assembly resolution 49/53 and to hold a second series of meetings at United Nations Headquarters from 14 to 25 August 1995.

142. The Committee considered recommendations of the Bureau concerning the organization of work for that second series of meetings (see annex II to the present summary). It took note of those recommendations.

Notes

1/ For the membership of the Ad Hoc Committee at its first session, see A/AC.244/INF/1 and Add.1.

2/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), chap. II.B.I; A/49/355.

3/ Comments were received from: Azerbaijan, Belarus, China, Cyprus, Czech Republic, France, Libyan Arab Jamahiriya, Singapore, Sudan, Sweden, Switzerland, United States of America and Venezuela, as well as from the Crime Prevention and Criminal Justice Branch and the United Nations International Drug Control Programme and from the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

4/ It was noted in this connection that the draft contained no provision on the competence of the accused to stand trial.

ANNEX I

Tentative list of major substantive and administrative issues arising out of the draft statute for an international criminal court prepared by the International Law Commission, reflecting the informal consultations of the regional groups on 15 and 17 March 1995

Organizational issues (articles 1-19)*

1. Establishment and composition of the international criminal court:

(a) Method of establishment (if by treaty, requirements for entry into force);

(b) Relationship with the United Nations;

(c) Nature of the court as a permanent institution;

(d) Appointment of judges and the Prosecutor;

(e) Role of the Prosecutor;

(f) Adoption of the rules of the court.

Issues pertaining to jurisdiction (articles 20-31, 33 and annex to the draft statute)

2. Applicable law and jurisdiction of the court:

- Specification of the crimes.

3. Exercise of jurisdiction:

(a) Inherent jurisdiction;

(b) Mechanism by which States accept the jurisdiction of the court;

(c) Trigger mechanism;

(d) Conditions for the exercise of jurisdiction;

(e) Role of the Security Council;

(f) Statute of limitations.

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* See also appendixes I to III to the draft statute.

Methods of proceedings (articles 25-50)

4. Due process:

(a) Measures to ensure fair trial;

(b) Trials in absentia;

(c) Qualifications for and competence of defence counsel;

(d) Applicable penalties;

(e) Remedies for the violation of the rights of suspects and defendants.

Relationship between States parties, non-States parties and the international criminal court (articles 51-57)

5. International cooperation and judicial assistance:

- Pre-trial detention and enforcement of sentences.

6. Cooperation between States parties and the court:

- National investigations and judicial proceedings.

7. Effect of judgements (non bis in idem).

Miscellaneous

8. Budget and administration:

- Discussion, on the basis of the preliminary report by the Secretary-General, of provisional estimates of staffing, structure and costs of the establishment and operation of the court.

* * *

Note. It was observed that it would be useful to structure the discussion in such a way that each of the above items could be discussed.

It was also observed that the tentative list of issues was intended to serve only as a guideline without precluding the discussion of other items.

The hope was expressed that this informal paper would assist the Ad Hoc Committee in the organization of its work with a view to facilitating the discussion of the substantive and administrative issues arising out of the draft statute in the limited time available.

ANNEX II

Recommendations of the Bureau concerning the work of the Ad Hoc Committee during the period 14-25 August 1995

The Bureau recommends that the Ad Hoc Committee should focus its attention on the following list of issues, which does not prejudge the position of any delegation or preclude the consideration of other issues:

I. COMPLEMENTARITY

1. Principle of complementarity:

(a) Question of reflecting the principle in an operative provision of the statute;

(b) Relationship to national jurisdiction:

- Extent to which primacy of national jurisdiction legitimately exercised should be preserved;

(c) Clearer definition of the principle and the consideration of that principle in relation to the relevant provisions of the statute:

(i) Consequences for jurisdiction, including the crimes to be covered and the distinction between more or less serious crimes;

(ii) Consequences for admissibility: question of reflecting the principle as a condition in relation to the exercise of jurisdiction in every case rather than as a discretionary power to be exercised in certain cases;

(iii) Consequences of the principle with respect to the consent requirements, the trigger mechanism, national investigations and proceedings, and the non bis in idem principle;

(iv) Impact on international judicial cooperation.

II. ISSUES PERTAINING TO JURISDICTION

2. Applicable law and jurisdiction of the court:

(a) Question of the crimes to be covered by the statute:

(i) Genocide;

(ii) Aggression;

(iii) Serious violations of the laws or customs applicable in armed conflicts;

(iv) Crimes against humanity;

(v) Treaty crimes under subparagraph (e) of article 20;

(vi) Question of adding to subparagraph (e) the Convention on the Safety of United Nations and Associated Personnel or other relevant instruments;

(b) Specification of crimes (definitions, elements and penalties):

(i) Genocide: whether the relevant convention provides a sufficient basis for defining this crime or whether the definition requires further elaboration;

(ii) Aggression: whether conventional or customary law provides an adequate basis for defining this crime for purposes of determining individual criminal responsibility and the question of the role of the Security Council in relation to this crime;

(iii) Serious violations of the laws or customs applicable in armed conflict: clarification of the term "serious" and the content of such violations under customary or conventional law and the relationship between "serious violations" and grave breaches of the Geneva Conventions;

(iv) Crimes against humanity: question of elaborating a definition of such crimes that would take into account the existing texts, provide an appropriate qualitative criterion (e.g., large-scale and systematic violations) and indicate whether the definition would apply to situations other than armed conflicts;

(v) Treaty crimes under subparagraph (e) of article 20: question of whether the crimes should be defined by means of elaboration in the statute or by reference to the relevant treaties;

(vi) Penalties:

- The type of penalties to be imposed by the court (death penalty, imprisonment, fines or, alternatively, imprisonment, restitution or other appropriate measures);

- Question of elaborating a general range of maximum and minimum penalties or specific penalties for each of the crimes in the statute or, alternatively, identifying the national law to be applied;

(c) General rules of criminal law:

(i) Identifying the general rules of criminal law that would be relevant to the functioning of the court:

- The principles of individual criminal responsibility (command responsibility), responsibility for participation in a group, responsibility of decision-makers as distinguished from the responsibility of the perpetrators, mental element required for the different crimes, conditions for exoneration, defences and mental capacity);

- Evidentiary and procedural rules;

(ii) Whether to include such rules in the statute or to identify the rules of national law to which the court is to have recourse.

3. Exercise of jurisdiction:

(a) Inherent jurisdiction;

(b) State consent requirements:

(i) Territorial State;

(ii) Custodial State;

(iii) State of nationality of the accused;

(iv) State of nationality of the victim;

(v) State which was the target of the crime;

(c) Mechanism by which States accept the jurisdiction of the court;

(d) Trigger mechanism;

(e) Role of the Security Council;

(f) Question of considering different approaches for different categories of crimes;

(g) Statute of limitations.

III. METHODS OF PROCEEDINGS

4. Due process:

(a) Trial procedures, including measures to ensure fair trials;

(b) Trials <u>in absentia</u>;

(c) Qualifications for and competence of defence counsels;

(d) Rights of suspects, defendants and witnesses;

(e) Non bis in idem;

(f) Rules of the court;

(g) Admissibility;

(h) Powers of the Prosecutor;

(i) Powers of the Presidency;

(j) Imposition of penalties, aggravating or mitigating circumstances, parole, pardon, probation, commutation of sentences, transfer of execution of sentences.

IV. RELATIONSHIP BETWEEN STATES PARTIES, NON-STATES PARTIES AND THE INTERNATIONAL CRIMINAL COURT

5. International cooperation and judicial assistance (including pre-trial detention and enforcement of sentences).

6. Cooperation between States parties and the court (including national investigations, judicial proceedings and extradition or surrender).

7. Effects of judgements (non bis in idem).

V. BUDGET AND ADMINISTRATION

8. Discussion, on the basis of the preliminary report by the Secretary-General, of provisional estimates of staffing, structure and costs of the establishment and operation of the court.

VI. MISCELLANEOUS

9. Relationship between the court and the United Nations.

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The Bureau further recommends the re-establishment of an open-ended Working Group to consider issues relating to due process (including the rules of the court) and, in addition, the relationship between States parties, non-States parties and the court.